In the Supreme Court
of the United States

OCTOBER TERM, 1945

No.....

JOHN H. SWATZKA,

Petitioner,

vs.

Colonel MAX W. SULLIVAN, Commanding Officer, Fort Lewis, Washington, and Lieutenant-Colonel DAVID L. FREDENBURG, Commanding Officer, Reception Center, Fort Lewis, Washington,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
JURISDICTIONAL STATEMENT

The petitioner's minor son, John Gale Swatzka, was inducted into the Army of the United States of America at Fort Lewis, Washington on May 13, 1944 (R. 5 and 69). The petitioner and his son had completely exhausted their administrative remedies (R.

3-5 and 67-69). The petitioner upon May 15, 1944, for and on his own behalf and on behalf of his son, the registrant, and with his son's knowledge and consent, filed a petition for writ of habeas corpus in the District Court of the United States, Western District of Washington, Southern Division (R. 2-65). This petition was filed under authority of 28 U.S.C.A. Sec. 451-452. Said District Court on June 1, 1944 made and entered an order discharging the registrant from the United States Army and remanding him back to his local draft board (R. 71-73). The respondents appealed from said order to the Ninth Circuit Court of Appeals (R. 100-101), which court had jurisdiction to consider this appeal under authority of Judicial Code, Sec. 128(a), 28 U.S.C.A., Sec. 225(a), and under authority of 28 U.S.C.A., Sec. 463(a).

The opinion of the Ninth Circuit Court of Appeals reversing the judgment of the trial court was rendered and filed on May 1, 1945. ... F. (2d) ... (R. 315-319). The judgment of the Ninth Circuit Court of Appeals was entered on May 1, 1945 (R. 319). The petitioner, within the time allowed therefor by rule of the Ninth Circuit Court of Appeals, filed his petition for rehearing which was denied on June 12, 1945 (R. 320).

The right of the Supreme Court to assume jurisdiction to review the decision of the Circuit Court of Appeals by writ of certiorari, is covered by Judicial Code Sec. 240(a), 28 U.S.C.A., Sec. 347(a).

STATEMENT OF FACTS

John Gale Swatzka, petitioner's minor son, registered with his Local Board No. 1 for Linn County at Albany, Oregon on December 24, 1943, the date of his 18th Birthday (R. 256). A questionnaire (Exhibit A1-1) (R. 125 to 129) received in evidence (R. 123) was completed and returned to the Board by the registrant on January 10, 1944. Also, registrant on or about that date furnished an occupation questionnaire (Ex. A1-2) (R. 130-131) received in evidence (R. 123) and a special questionnaire for farm workers (Ex. A1-3) (R. 131-139) received in evidence (R. 123). These three Exhibits show that the registrant was a farmer substantially engaged in the occupation of farming, working full time at this occupation on a farm having 370 acres used for crops, listing in detail the crops grown, stock cared for, and further showing that there was only one other person besides the registrant himself, to-wit: his father, the petitioner herein, engaged in working on this farm project.

At a meeting of said Local Board on January 3, 1944, the Minutes of said meeting stated that the petitioner and registrant appeared before said Board; that the petitioner and registrant have an excellent farm enterprise but that the registrant has never worked; that Mr. Swatzka, the petitioner, a hired man and Mrs. Swatzka, petitioner's wife, were the producing members of agricultural units; that a direct ques-

tion brought the answer that the production had been the work of the petitioner and a hired man and that the Board noted the registrant's hands were fat and smooth, showing no evidence of work, (Ex. A1-4) (R. 141) received in evidence (R. 123). The above findings by said Local Board were in direct contradiction to the facts before said Board in this:

The registrant was, and for all of his lifetime except while in school, had been a full time worker on said farm; there was no hired man; Mrs. Swatzka was and for many years last past had been an invalid and could not and did not work on or about said farm as a producing member or otherwise; that there was no direct question put to petitioner or to registrant and that neither stated to the Board or to any other person or persons that the production had been the work of petitioner and a hired man; that registrant's hands were not fat and smooth but were in fact hard and cracked and heavily calloused from years of daily toil on said farm.

Petitioner concedes that the registrant is physically fit for general military service and was so found in a pre-induction physical examination on January 25, 1944. (R. 149)

On February 7, 1944 the Local Board considered registrant's case and the minutes stated that the petitioner had personally visited every member of the Board; that registrant has been in school all the time:

that he went from high school to University summer school and flunked out; that his case had become a county affair; that one member of the Board helped install a milking machine at the farm over a year ago and that the registrant was in the house and never came out near the barn until coffee was served late in the afternoon. A motion was made and carried to turn the case over to the War Board. (Ex. A1-9) (R. 149-150) received in evidence (R. 123). The above statements were false and no basis for said statements were contained in the registrant's file.

The County War Board addressed a letter dated February 24, 1944, to the Local Draft Board stating it did not recommend agricultural classification for the registrant because the members of the War Board were of the opinion that the registrant in the past had not contributed to the agricultural production on the farm and, therefore, should not be given credit for the war units that are being earned. The War Board further stated that there were sufficient units produced on the farm to keep two or three workers. (Ex. A-10) (R. 150 and 151) received in evidence (R. 123). On February 28, 1944 at a meeting of Local Board No. 1, the minutes showed that this letter was read and then the minutes state that registrant is not a factor of production and has never worked on the farm and classified the registrant 1-A by a vote of 5 to 0. (Ex. A1-13) (R. 161) received in evidence (R. 123).

On March 6, 1944 the registrant and the petitioner herein gave notice of appeal supported by their respective affidavits. (Ex. A1-16, 17 and 18) (R. 163-166) received in evidence (R. 123).

On March 29, 1944 the registrant furnished the Local Board and the Appeal Board additional evidence for their consideration and to be included in registrant's file (Ex. A1-22 and 23) (R. 172-173) received in evidence (R. 123), said additional information consisting of affidavits (R. 11 to 65). On April 4, 1944, said local board notified the registrant that this additional information submitted by him did not warrant the reopening of his classification (Ex. A1-27) (R. 177) received in evidence (R. 123). This additional information showed conclusively, and it was in affidavit form, that the registrant and his father were operating a substantial farm enterprise. They further showed that the petitioner was a man sixty years of age and not in good health, and that registrant's mother had been an invalid for the last ten or twelve years and has been unable to do any physical work; and further showed that the registrant had put in his full time working on his parents' farms since August 27, 1943, being the time his parents removed him from attending the University of Oregon because of their need for his help on the farm and that prior to August 27, 1943 the registrant had worked at all times on this farm, except for the hours in which he was at school. Further, this evidence

showed that the registrant was necessary to and regularly engaged in an agricultural occupation essential to the war effort and that a satisfactory replacement could not be obtained. In addition to the affidavits of registrant, his father and mother, there were the affidavits of the mother's attending physician and of all the surrounding neighbors who were acquainted with and knew the facts concerning the situation and they were all to the same effect.

The Appeal Board met on April 12, 1944 (Ex. A-3) (R. 239-240) received in evidence (R. 123) and classified the registrant in Class 1-A by unanimous vote of 4 to 0.

Thereafter, the registrant was required to report for service and was formally inducted into the United States Army on May 13, 1944 and the petitioner on May 15, 1944 filed his petition for a Writ of Habeas Corpus on his own behalf and on behalf of the registrant. On May 15, 1944 the Honorable Charles H. Leavy, District Judge, made and entered an order requiring respondents to appear and show cause on May 31, 1944 why the registrant was being detained. (R. 65 and 66).

On May 26, 1944, respondents filed an answer and return (R. 66-70). On May 31, 1944 the registrant filed a Traverse to respondents' answer and return (R. 70-71).

After a hearing duly held, the court made and entered an order on June 1, 1944 remanding the registrant to his Local Draft Board and ordering registrant released from further detention and restraint by reason of his wrongful induction into the Army of the United States of America on May 13, 1944 (R. 71-73). The court rendered an opinion which the court made and entered as its findings of fact and conclusions of law (R. 75-97), the respondents making no objections to said findings of fact and conclusions of law and the respondents further did not request any findings of fact, conclusions of law or make any motion.

SPECIFICATION OF ERRORS

(1) The Ninth Circuit Court of Appeals erred in failing to hold that the Tydings amendment to the Selective Training and Service Act of 1940 provided for a statutory deferment for any registrant found to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, as long as he remained so engaged and until such time as a satisfactory replacement for him could be obtained.

(2) The Ninth Circuit Court of Appeals erred in failing to hold that where the draft board orders the induction of a registrant based on findings which are

not supported by any substantial evidence, there is a denial of due process of law and the registrant must be discharged from the Army upon a writ of habeas corpus.

(3) The Ninth Circuit Court of Appeals erred in failing to hold that where a draft board under the Selective Service Act abuses its discretion and inducts a registrant as a result of its unfair, unjust, arbitrary and capricious action, there is a denial of due process and that the Federal courts have the power as well as the duty to rectify such action in a habeas corpus proceedings.

(4) The Ninth Circuit Court of Appeals erred in failing to hold that the courts will discharge an inductee from the Army where that inductee has been drafted by the draft board which has committed errors of law and violated the Selective Service Regulations in drafting said inductee.

(5) The Ninth Circuit Court of Appeals erred in reversing the trial court where the findings of fact of the trial court in a habeas corpus proceedings were supported by substantial evidence and were not clearly wrong.

ARGUMENT

I.

The Ninth Circuit Court of Appeals erred in failing to hold that the Tydings Amendment to the Selective Training and Service Act of 1940 provided for a statutory deferment for any registrant found to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, as long as he remained so engaged and until such time as a satisfactory replacement for him could be obtained.

The Selective Training and Service Act of 1940 (50 U.S.C.A. App. Sec. 301 to 318) became law September 16, 1940. This Act provided for the registration of male citizens of the United States and aliens residing in the United States between the ages of twenty-one and thirty-six years. It also provided for the induction of a limited number of men into the service of the United States and provided for certain exceptions, exemptions or deferments from training and service. There was no specific exemption for deferment by reason of a man being engaged in agriculture. There was the general provision authorizing the President to make rules and regulations providing for a deferment from training and service for those men whose employment in industry, agriculture or other occupations or employment, or whose activities in other endeavors were found to be necessary

to the maintenance of national health, safety or interest.

This act was amended several times but the provision with regard to agricultural deferments was not changed by any of these amendments until November 13, 1942, when Section 305 of the Act was amended by adding a new subsection (k), this new subsection provided as follows:

> "(k) Every registrant found by a selective service local board, subject to appeal in accordance with section 10 (a)(2), to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained: Provided, That should any such person leave such occupation or endeavor, except for induction into the land or naval forces under this Act, his selective service local board, subject to appeal in accordance with section 10 (a)(2), shall reclassify such registrant in a class immediately available for military service, unless prior to leaving such occupation or endeavor he requests such local board to determine, and such local board, subject to appeal in accordance with section 10 (a)(2), determines, that it is in the best interest of the war effort for him to leave such occupation or endeavor for other work."
>
> (Ttitle 50, U.S.C.A. App. Sec. 305 (k))

Prior to the passage of this amendment agricultural deferments were within the discretion of the President and to be allowed in accordance with rules

and regulations issued by the President through the Director of Selective Service. With the passage of this amendment the discretion of the President was removed and the agricultural deferment provided therein became statutory. Every registrant after the passage of this amendment found to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort was by Act of Congress to be deferred so long as he remained so engaged and until such time as a satisfactory replacement for him could be obtained.

The debate in the United States Senate on October 24, 1942 as reported in the Congressional Record of that date, being Volume 88, shows that the above conclusion was the clear intent of the Congress of the United States. On pages 8639-8640 of that Congressional Record, it is reported that Senator Tydings offered this amendment to the Selective Training and Service Act for the reason that the trend of labor was from the farm to the factory and not from the factory to the farm. Senator Tydings expressed the hope that by the adoption of his amendment it would afford some inducment to farm laborers to stay on the farm.

Senator Maloney (Congressional Record, Volume 88, at page 8644 inquired of Senator Tydings if it would meet with his approval to change the amendment so that it would read "to be regularly engaged for at least 1 year prior to the passage of this act".

Senator Tydings replied:

"No; and I will tell the Senator why. I have in mind the case of an old gentleman afflicted with arthritis, who has a wife and daughter. He also has a boy about 19 years old who has been going to school but has just been called home. The old gentleman wrote me a letter stating that he rose from his bed, crippled as he was, and managed to milk 17 cows, as he had to do because his help had gone to York, Pa., on about 4 hours' notice and left all the cows to be attended to; that his wife wrestled with the heavy milk cans and finally got them down the lane 2 miles. He did not know what in the world to do, but with the help of his little daughter and his wife he is carrying on, but he cannot get any help. That was all stated in the letter he wrote me. His boy has been called back to help him in the emergency. In my judgment, if that case went to a draft board, the draft board would have to decide whether they wanted to put out of existence a 260 acre farm with 17 dairy cows, supplying milk to Baltimore City every day, by denying the help of this boy to the stricken family, and let him go into the Army, wiping out the whole farm and losing that much food. For this reason I should be opposed to any limitation on the time in the bill.

Mr. Maloney. Does the Senator think a draft board would refuse to defer that boy?

Mr. Tydings. If we said he had to be regularly employed—

Mr. Maloney. I mean entirely apart from the proposed amendment, under existing law, does not the Senator think that boy would get deferment?

Mr. Tydings. No, I know of cases very similar to that, of farmers who have written me that

boys have been taken. I can show the Senator, as others on this floor can show the Senator, I am sure, that many times a farmer, whether he is a dairy farmer or a grain farmer or what not, has had to sell his farm equipment and move to town and rent a house, because he could not get help on his farm.

Mr. Maloney. Does the Senator from Maryland deny that under existing law the draft board would have a right to defer that boy?

Mr. Tydings. It may have the right, but the draft boards have not been inclined until recently to grant deferments in such cases as this."

Senator Maloney offered his amendment with regard to the one year provision and his amendment was rejected by the Senate. Senator Maloney then stated (page 8644, Congressional Record, supra):

"I should like to take advantage of the Senator's time to point out that under the language of this amendment, men who now go to the farms are not going to go to war. This language is a directive. It says they shall be exempt after it is found that they are on the farms. There is no discretion left the local boards. I am amazed that the amendment is to be hurried through so quickly as I see it will be."

Senator Tydings' amendment, which became subsection (k) of Section 305 above quoted, was passed by the United States Senate by a vote of 62 to 6, and the House concurred in this amendment. It is clear from the debate in the United States Senate that the purpose of the Tydings amendment was to make it mandatory upon the Selective Service System to grant

a farm deferment in such a case as the instant case.

The Ninth Circuit Court of Appeals did not even attempt to pass upon this question and this question was specifically and carefully pointed out to the court. It is petitioner's contention that in the event a registrant qualifies for the exemption under the Tydings Amendment, it is mandatory for the board to grant the exemption. The record before the local board and the appeal board was conclusive that the registrant in this case came within this exemption. This is a question that has never been decided by this Honorable Court and it is an important question of Federal law which has not been but should be settled by this Court. Furthermore, the decision of the Ninth Circuit Court of Appeals in the case at bar was directly contrary to the wording of the Tydings Amendment and the intention of Congress in passing said amendment as disclosed by the Congressional debate as set forth herein, supra. This Honorable Court should pass upon this question in order to give effect to the Tydings Amendment. The trial court did follow the Tydings Amendment. The Circuit Court of Appeals abandoned and disregarded the Tydings Amendment. Under the decision of the Circuit Court of Appeals in this case, the Tydings Amendment has no effect whatsoever.

II.

The Ninth Circuit Court of Appeals erred in failing to hold that where the draft board orders the induction of a registrant based on findings which are not supported by any substantial evidence, there is a denial of due process of law and the registrant must be discharged from the Army upon a writ of habeas corpus.

The contention of the respondents as presented in their brief before the Circuit Court of Appeals and as argued by them at time of oral argument, was that the decisions of the local and appeal boards under the Selective Service Act are not subject to any review by the courts whatsoever, except in the event there has been a denial of an opportunity to present evidence and to be heard, and as the respondents put it, only in the event of a procedural failure .

It is apparent that such a contention is faulty upon its very face. This can be made clear by a hypothetical example. Assume that his Excellency, The Honorable Earl Snell, Governor of the State of Oregon, registered under the Selective Service Act, as he undoubtedly was required to do, and he gave his occupation in his questionnaire as being the Governor of the State of Oregon. Section 305(c) (1) of said Act provides that the governors of the several states shall be deferred from training and service under said Act. Assume further that Governor Snell's local board

classified him in Class I-A. Then Governor Snell presents, within the time provided, conclusive evidence showing that he is Governor of the State of Oregon. The draft board gives him every opportunity to be heard, receives all evidence furnished by him and, therefore, there is no procedural defect, but still the draft board continues the classification of I-A and upon appeal to the appeal board, the appeal board listens to all of his evidence, reads the same and considers the same but still classifies Governor Snell as I-A. If we accept the position urged by the respondents in this case, then Governor Snell would have no right of review to the courts and there would be nothing that he could do, even though his induction was directly contrary to the law. Obviously, that is not the law.

The respondents point out in their opening brief (page 27) filed with the Ninth Circuit Court of Appeals that the Circuit Courts of Appeal are in direct conflict as to the right of review by the courts of the actions of draft boards under the Selective Service Act. The petitioner herein agrees with the respondents on this point and further agrees that this conflict falls into three classes:

(1) Unless there is substantial evidence to sustain the findings of the draft board, the action of the draft board is arbitrary and a denial of due process and the erroneous action of the draft board will be corrected by the court on a writ of habeas corpus and

the registrant will be discharged.

(2) Unless there is some evidence to sustain the findings of the draft board, the action of the draft board is arbitrary and a denial of due process and the erroneous action of the draft board will be corrected by the court on a writ of habeas corpus and the registrant will be discharged.

(3) That due process has been afforded to the registrant where his draft board has considered all the evidence presented to it, without regard to what the conclusions of the draft board may be.

It was the respondent's contention at the time of the trial and in its brief filed with the Circuit Court of Appeals, and in its oral argument before the Circuit Court of Appeals, that the last stated rule of review is the correct rule, namely, that the courts are limited to a consideration of the procedure followed by the boards under the Selective Service Act.

The opinion of the Ninth Circuit Court of Appeals in the case at bar does not state definitely which of these rules the Ninth Circuit is following. The opinion is vague upon this point, even though this matter was thoroughly presented to the court and even though the petitioner herein filed a petition for rehearing and specifically asked the court that in the event the Ninth Circuit Court of Appeals should see fit to disallow the petitioner's petition for rehearing, that the court would at least amplify its opinion in

this case and pass upon the points of law involved definitely and clearly so that the petitioner's petition for a writ of certiorari to the Supreme Court of the United States could be more adequately considered by this Honorable Court. The Ninth Circuit Court of Appeals in denying the petitioner's petition for rehearing, refused to do this.

The petitioner's contention is that the first rule of review listed above is the correct rule. It is clearly the majority rule and one supported by the accepted understanding of the meaning of due process. The following cases have followed the first rule of review which is known as the "substantial evidence" rule.

(1) *Rase v. United States,* (C.C.A. 6, decided June 29, 1943) 129 F. (2d) 204, held that while the rule is established that the action of such local boards within the scope of their authority is final and not subject to judicial review when the investigation has been fair and the findings supported by substantial evidence, nevertheless, upon proof that the investigation has not been fair or that the board has abused its discretion by a finding contrary to all the substantial evidence, relief may be accorded by the courts under the writ of habeas corpus.

(2) *Benesch vs. Underwood* (C.C.A. 6, decided December 17, 1942) 132 F. (2d) 430, held that where the board abuses its discretion by a finding contrary to all the substantial evidence, the courts are open

for relief under the writ of habeas corpus, if the registrant has exhausted his administrative remedies.

(3) *Checinski v. United States* (C.C.A. 6, decided June 29, 1942) 129 F. (2d) 461, adopted the substantial evidence rule.

(4) *United States v. Mroz* (C.C.A. 7, decided June 3, 1943) 136 F. (2d) 221. This case cited with approval the cases of *Seele v. United States* (C.C.A. 8) 133 F. (2d) 1015; *Rase v. United States, supra;* and others, all of which held that unless there is substantial evidence to sustain the findings of the draft board, the action of the draft board is arbitrary and a denial of due process and the registrant will be discharged from the Army under a writ of habeas corpus.

(5) *Bronemann v. United States* (C.C.A. 8, decided October 28, 1943) 138 F. (2d) 333, held that it is the fundamental power of the courts to protect against deprivation of liberty without due process of law, and that no legislative enactment may deprive the courts of that power; that arbitrary dishonest action by draft authorities is not due process of law.

(6) *Graf v. Mallon* (C.C.A. 8, decided October 11, 1943) 138 F. (2d) 230, held that the determinations of the draft boards are final and cannot be set aside by the courts, except upon a showing that no fair opportunity to be heard was accorded or that the findings of the boards were not supported by substantial

evidence, and cited cases to sustain this point from the Second, Third, Fourth, Sixth and Eighth Circuits.

(7) *Seele v. United States* (C.C.A. 8, decided February 23, 1943) 133 F. (2d) 1015, held that relief by habeas corpus will be granted registrant where the draft board has acted arbitrarily and capriciously and without substantial evidence.

(8) *Johnson v. United States* (C.C.A. 8, decided March 10, 1942) 126 F. (2d) 242, held that the courts have no power to classify registrants—that is solely for the agencies created by and under the authority of the Congress. But classification by such agencies must, under the powers given them by Congress, be honestly made and a classification made in the teeth of all of the evidence before such agency is not honest but arbitarary. Courts can prevent arbitrary action of such agencies from being effective.

The Second Circuit has adopted the second numbered rule of review which is known as the "any evidence rule". See *United States ex rel. Trainin v. Cain* (C.C.A. 2, decided August 15, 1944) 144 F. (2d) 944, in which the court held that it is clear that Congress cannot deny any registrant the Constitutional protection of due process of law, and that it is an error reviewable by the courts when it appears that the proceedings conducted by such boards have been without or in excess of their jurisdiction or have been so manifestly unfair as to prevent a fair investigation

or that there has been a manifest abuse of the discretion with which they are invested under the act. The court then in its opinion goes ahead and classifies the decisions of the different circuits and points out the conflict between the circuits as mentioned above, and then this court adopts the second numbered right of review, namely, the "any evidence" rule, and states to deny review, whatever may be the facts, so long as the forms of law have been followed, is to constitute arbitrary and unfair action which is not consonant with our historic ideas of due process. The effect of this decision is that unless there is evidence to support the findings of the draft board, there has been a denial of due process and the registrant is entitled to be released from the Army upon a writ of habeas corpus.

One circuit, namely, the Third Circuit, has adopted the third rule listed above, and the one contended for by the Government in this case. See *Ex Parte Stanziale* (C.C.A. 3, decided October 6, 1943) 138 F. (2d) 312. This court held that the test of whether a draft board's action may be attacked seems to shift from whether its findings are supported by substantial evidence to whether it received and considered what a particular registrant submitted. However, the court assumed in its decision that where a local board violates a provision of one of the regulations, the person affected may have court relief. This case was decided before the Supreme Court of the United

States decided the cases of *Billings v. Truesdell,* 321 U.S. 542, decided March 27, 1944, and *Falbo v. United States,* 320 U.S. 549, decided January 3, 1944. Following the decisions of the Supreme Court of the United States in the last two cited cases, the Third Circuit decided the case of *United States v. Pitt* on July 27, 1944 (144 F. (2d) 169.) This opinion states that if the Selective Service agencies had acted capriciously or arbitrarily and that their decisions were not in accordance with the evidence, then the question would arise under the rules of Falbo and Billings cases as to when and where and how a registrant could raise as a defense to an induction order of his local board a failure to accord him the rights guaranteed to him under the act, such failure in itself constituting a denial of due process of law. The court stated that this question was not presently before it. This would appear to mean that the Third Circuit, following the decisions of the Supreme Court of the United States, might depart from its holding in the *Ex Parte Stanziale* case and thus depart from the contention of the Government in the present case.

The respondents in their reply brief filed with the Ninth Circuit Court of Appeals, cited the case of *Lehr v. United States* (C.C.A. 5, decided December 16, 1943) 139 F. (2d) 919, as authority for its contention. However, this same Circuit in its decision in the case of *Harris v. Ross* (C.C.A. 5, decided November 7, 1944) 146 F. (2d) 355, held that courts can

review acts of the draft boards where they have acted beyond the scope of their jurisdiction and power, or in such a fraudulent or capricious manner as to render their acts a nullity.

The most that can be said for the respondent's position is that it has support in the Third Circuit in the *Stanziale* case, but this case has been weakened by a later decision in the case of *United States v. Pitt,* supra, and there is some support for the respondent's contention in the case of *Lehr v. United States,* supra, but the effect of this decision has also been weakened by its later decision in the case of *Harris v. Ross,* supra.

Against the respondent's contention are the decisions of the Second, Sixth, Seventh and Eighth Circuits. The First, Fourth and Tenth have not passed directly upon this question. The case at bar was the first opportunity of the Ninth Circuit Court to pass directly upon this question, and the holding of the Ninth Circuit Court of Appeals in this case adopted the respondent's contention, namely, the procedural right of review, even though this position is very much in the minority and is directly contrary to the decisions of the other Circuit Courts of Appeal.

The Supreme Court of the United States has not passed upon this point. However, Justice Douglas in a concurring opinion in the case of *Hirabayashi v. United States,* decided June 21, 1943, 320 U.S. 81, stated as follows:

> "There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act and to refuse or fail to be inducted. He must submit to the law. But that line of authority holds that after induction he may obtain through habeas corpus, a hearing on the legality of his classification by the draft board."

The cases cited by Justice Douglas in his concurring opinion in support of the above point, are cases which hold that unless there is substantial evidence to sustain the findings of the draft board, there has been a denial of due process.

The record is conclusive that there was not any substantial evidence to sustain the findings of the draft boards that passed upon the classification of the registrant herein. Also, the record is conclusive that there was not any evidence to sustain the findings of the draft boards. Under the authorities cited, whether this Honorable Court adopts the "any evidence" rule or the "substantial evidence" rule there was a denial of due process in making a finding and classification without the basis of any evidence whatsoever and the registrant was entitled to be discharged from the Army by reason of this denial of due process. This was the finding made by the trial judge.

The trial judge also found from the registrant's record before the draft boards, that the draft boards

were biased and prejudiced and acted arbitrarily and capriciously and in violation of the law. The findings of fact by the trial judge were supported by evidence and this in itself was a denial of due process. For example, it was found in the draft board records that the registrant had flunked out of school. Then it was admitted by the draft board testifying through its secretary that this was false. The draft board records divulged that there was a finding that the registrant was in the house during the time a milking machine was installed on the farm. This was admitted at the trial to be false. The draft board records stated that the registrant's hands were soft, showing no evidence of work. This was found at the trial to be false. The findings of the draft board were based solely upon one thing and that was that the registrant had not been a factor in the production of the farm. This was found to be false. It is hard to conceive of any evidence that could be stronger showing that the draft board was arbitrary and capricious. It is admitted that their findings are based upon false and fraudulent evidence. A finding of fact cannot be any stronger than the evidence upon which it is made. Here the evidence which the draft board took to be true has since been admitted by them as being false. Obviously, the finding is false and based upon prejudice and bias and it was so found by the trial judge.

Even adopting, for the sake of argument, the respondent's contention that the right of review is

limited to whether or not there was a procedural defect, one of the essentials of the necessary procedure is for the draft boards to consider and to consider fairly all of the evidence presented to them. The trial judge found that the draft boards did not consider the evidence presented to them. The mere reading of a statement is not in itself consideration. Where the evidence in the file shows conclusively that the registrant is the principal factor in the production of the farm produce on the farm, and there is no evidence whatsoever to the contrary, there can only be one finding if consideration is given to the evidence before the board. The mere giving of an opportunity to file papers is not due process. There must be fair consideration of the evidence and this was totally lacking in the present case.

The petitioner respectfully represents to this Honorable Court that the Ninth Circuit Court of Appeals departed from the "substantial evidence" rule, as adopted by the other Circuit Courts of Appeal, and in so doing clearly committed an error which should be rectified by this Hoanorable Court. But whether the courts adopt the "substantial evidence" rule, the "any evidence" rule, or the "procedural defect" rule, there was a clear showing as found by the trial court that there was a denial of due process and that draft boards acted in an arbitrary and capricious manner and their decisions were the result of bias and prejudice. The record in this case is conclusive in support

of the petitioner's contention made herein.

In view of the fact that the Circuit Courts of Appeal are in direct conflict on this point, and in view of the fact that this Honorable Court has never decided this important question of Federal law, the petitioner's petition for writ of certiorari should be granted in order to have these questions finally settled.

The Selective Service Statute itself does not provide for review by the courts. This presents a very important question of administrative law which has never been determined by this Honorable Court. That is, can Congress confer upon an administrative body the power and right to deprive a citizen of his liberty, or his property, through the action of an administrative body with no right of appeal to the courts, even though the decisions of that administrative body are not supported by any evidence at all.

If Congress does have that power which petitioner claims is directly contrary to the 5th Amendment to the Constitution of the United States, namely, the due process clause, then the freedom and liberty which has always been guaranteed in this country, is in danger. For example, assume that this country should some day have a President of the United States with prejudices against the members of some religion or of some race, and that President was able to persuade Congress to pass a law granting power to

some administrative board to pass upon the property rights or the liberty of our citizens. This administrative body, which would be appointed by this same President, would then be in a position to take out these prejudices against such race or members of such regligious body, and unless our citizens were protected by the courts, our fredeom would be gone.

The petitioner submits that this very problem is involved in the case at bar. If it is possible for those acting under the Selective Service Act to do this very thing, it would be possible for some other administrative body to act arbitrarily and without anything to support it and the freedoms which have been the mainstay of our country, would be lost.

III.

The Ninth Circuit Court of Appeals erred in failing to hold that where a draft board under the Selective Service Act abuses its discretion and inducts a registrant as a result of its unfair, unjust, arbitrary and capricious action, there is a denial of due process and that the Federal courts have the power as well as the duty to rectify such action in a habeas corpus proceedings.

The argument set forth in support of petitioner's specification of errors No. 2 above is applicable in

support of this error committed by the Ninth Circuit Court of Appeals.

It has been clearly recognized that where the action of the draft board is the result of unfair, unjust, arbitrary and capricious action, there is a denial of due process and the action of the draft board will be rectified by the courts in a habeas corpus proceedings. (*United States ex rel. Trainin v. Caine*, supra; *Seele v. United States*, supra; *Bronemann v. United States*, supra; and *Rase v. United States*, supra.)

The trial court made a finding that the action of the draft board was the result of bias and prejudice towards the registrant and was arbitrary and capricious. The Ninth Circuit Court of Appeals in its opinion in the case at bar stated: "We are unable to take the view, to which the able and experienced trial judge was persuaded, that the action of the boards was arbitrary to the extent of denying due process." This seems to be an agreement with the trial judge that the boards were arbitrary to some extent but here we have an attempt by the appellate court to weigh the extent of the arbitrary action in determining whether or not it was a denial of due process. For this reason alone the petitioner respectfully submits that his petition for a writ of certiorari should be granted by this Honorable Court to correct this error of the Ninth Circuit Court of Appeals.

IV.

The Ninth Circuit Court of Appeals erred in failing to hold that the courts will discharge an inductee from the Army where that inductee has been drafted by the draft board which has committed errors of law and violated the Selective Service Regulations in drafting said inductee.

The draft boards in classifying the registrant in the case at bar, violated the law in four definite particulars:

The first error committed by the local draft board was the consideration of matters not contained in the registrant's file. Section 623.2 of the regulations issued by the Director of the Selective Service System provided as follows:

> "623.2. Information considered for classification. The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent over 18 years of Age (Form 40A), Affidavit —Occupation Classification (Form 42), or Affidavit—Occupation Classification (Form 42A), and such other written information as may be contained in his file; provided, however, when a registrant has failed or hereafter fails to return his Selective Service Questionnaire (Form 40) within the time allowed by section 621.2 or when he has failed or hereafter fails to provide the local board with any other information concerning his status which he is requested or required to furnish, the local board shall proceed with his classification without such information. Oral in-

> formation should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file."

The local draft board when classifying a registrant must obey this regulation. This regulation is very restrictive and only permits the draft board in classifying a registrant to base its decision on the registrant's file. The draft board cannot consider any other matter whatsoever unless it is contained in the registrant's file.

The respondents in their opening brief filed with the Circuit Court of Appeals, set up five matters (pages 25 & 26) in their attempt to sustain their position that there was some evidence to support the finding of the draft board. The last three matters cited by the respondents in their brief, namely, that the United States Department of Agriculture War Board recommended against agricultural classification, the need for additional inductees, and the personal knowledge of the board members of local, economic, industrial and social conditions, could not legally, under this regulation, even be considered by the local draft board. Yet it is apparent that the draft board violated this regulation by considering these matters and using them for an excuse to justify their bias and prejudice.

Another matter listed by the respondents in their brief is the fact that the registrant had attended the University of Oregon in the summer of 1943. This is not a matter that could properly be considered in classifying the registrant because it had no value one way or the other in determining whether or not the registrant was a necessary factor in the production on the farm, or whether a suitable replacement could be found for him. Petitioner calls this court's attention to the example set forth by Senator Tydings in the debate in the United States Senate at the time Tydings amendment was adopted. (Congressional Record, Vol. 88, No. 186, pages 8638-8645.) This example shows that in a case where a young man is called home from school to work on the farm, that young man is entitled to a deferment and comes within the provisions of the Tydings amendment. This was error of law committed by the draft board by arriving at a decision based on its misunderstandings of the Tydings amendment. The opinion of the Circuit Court of Appeals in this case recognizes that the draft board gave weight to this fact and so by the very opinion itself it shows that the draft board violated the law to the detriment of the registrant in this case.

The only other matter that the respondents, after a very careful search of the record in this case, could present in attempt to sustain their position was that the draft board records showed that the petitioner had

told the board that he, a hired man, and Mrs. Swatzka were the producing members of the agricultural units and that the registrant's hands were soft and fat indicating no evidence of work. The trial court definitely found that these statements were false. As a matter of fact, the record is clear that there was no hired man and that Mrs. Swatzka had been an invalid for a good many years, and that the production was the result of the efforts and work of the registrant. If there ever was a case that clearly called for the intervention of a court, it is this present case which showed that the draft board not only violated the law and the regulations under which it was bound to act, but the draft board either deliberately or carelessly or for some unaccountable reason based its entire findings upon false statements which have been recognized as being false.

The second error of law committed by the draft board in this case is proven conclusively by the letter written by the draft board informing the Linn County War Board, that in all agricultural classifications between the ages of eighteen to twenty-five years, it must be proven beyond a doubt that the registrant is actually himself doing work which produces a large marketable surplus of food products, that he has been a factor in his production for at least two or three years. (R. 216). This shows that the local draft board understood and applied the Tydings amendment to mean that a registrant must have been a factor in

the production of food for a period of at least two or three years. This is directly contrary to the Tydings amendment and a direct violation of the law. All that the draft board was permitted to consider under the Tydings amendment was whether or not the registrant was a factor of production at the time the registrant was classified. As to what the registrant was doing six months before, a year before, or at any other time before his classification, is immaterial and not for the consideration of the draft board in classifying that registrant. Although this error of law was definitely pointed out to the Circuit Court of Appeals, the opinion failed to consider it. The effect of the opinion in this case is that a draft board can do anything it pleases, regardless of whether it is in violation of the law or regardless of what the facts are. This is, of course, not the law and it is the duty of the courts to rectify such errors.

The third error of law committed by the draft board in this case was its illegal delegation of its power to make its decision, to the War Board. The Selective Service Act itself, including the Tydings amendment and the regulations issued thereunder, does not provide or give authority to the war boards to classify as was done in the present case. It would have been perfectly proper for the local board in this case to have asked the war board to make an investigation and then have the War Board furnish to the local board the facts found as result of this investiga-

tion, and have those facts then included in the registrant's file for the draft board to consider when the draft board made its decision. An opinion by the war board as to whether or not the registrant was entitled to a classification of II-C is no information at all but merely a conclusion. The draft board certainly could not make any findings based upon conclusions and opinions of another agency. The record is conclusive that the draft board had delegated its decision to the war board and then in classifying the registrant merely rubber stamped its approval of the war board's decision, because the minutes of the meeting of the local board on February 28, 1944 show that the local board made a finding that the war board had made a fair decision (R. 161). Furthermore, the war board was guided in its decision by written instructions from the draft board that it was necessary for a registrant to have been a factor of production for at least two or three years, which as pointed out above, is a clear misstatement of the law.

It is unnnecessary to remind this Honorable Court of the general rule of law that a delegated authority cannot be redelegated. Congress created the Selective Service System and delegated to this System certain powers, but Congress did not grant to the Selective Service System the power or the right to delegate decisions to another agency. In order for a classification to be legal, that classification must be made by

the Selective Service System. A classification by a county war board, another agency of the Government without any power or authority to act, is an illegal act. The local board in this case delegated its duties and responsibilities to the county war board without having any authority to do so and thus acted contrary to the law.

This was another error of law which, although called to the Circuit Court of Appeal's attention, was not passed upon by the court in its opinion. Yet this violation of the law by the local draft board was in itself sufficient to compel a court to rectify the error and cause the discharge of the registrant from the Army.

The fourth error of law committed by the local draft board was its refusal to reopen and consider anew the registrant's classification upon receiving from the registrant his affidavit, together with the affidavits of all his surrounding neighbors. These affidavits are set forth in the record (R. 11-65). The State Director of the Selective Service System wrote the local board in this case, in part as follows: "If you find that the request to reopen and consider anew, is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification, you will reopen and consider anew the classification of this registrant * * *." (R. 174-175). The action of the local board in

response to this was to advise the registrant that the information submitted by him did not warrant the reopening of his classification (R. 177). The information submitted by the registrant in these affidavits show that the registrant was the factor of production for the farm in question, and further showed that he was irreplaceable. These affidavits were directly contrary to the findings made by the local board. The local board was directed to reopen the case by the head of the Selective Service System, if these statements, if true, would warrant reclassification. In other words, the local board was not directed or authorized to pass upon the truth or falsity of these statements but was directed to accept them as being true facts. While the local board may have seen these affidavits and may have even read them, clearly the board did not consider this new information at all. This is apparent and will be apparent to this court upon reading these affidavits (R. 11-65), for these affidavits definitely state that the registrant was the factor of production and irreplaceable and definitely conflict with the prior findings made by the local board. The board was directed to reopen the classification, if the statements contained in these affidavits would warrant a different classification. It might have been that the local board upon reclassifying the registrant, might have found these statements not to be true and might have given the registrant the same classification, but the local board

committed an error of law and a violation of the Selective Service Regulations and a violation of the order of the head of the State Selective Service System when it refused to reopen the classification. Nothing could be clearer than the statement that a deliberate violation of the law and the regulations is an arbitrary capricious action that could have only been taken as the result of bias and prejudice.

The courts have uniformly held that where the draft boards violate the law, act under a misunderstanding of the law, or violate the regulations, that the classification is not a legal classification and the registrant is entitled to relief from the court under a writ of habeas corpus.

In *United States v. Grieme* (C.C.A. 3, decided June 9, 1942) 128 F. (2d) 811, the court held that the findings upon which the draft boards base their decisions are final, unless the person affected thereby has not been afforded a full and fair hearing, or *unless the members of the local draft board acted contrary to law,* or abused the discretion reposed in them by the statute (citing cases).

In *United States ex rel. Phillips v. Downer* (C.C. A. 2, decided May 7, 1943) 135 F. (2d) 521, 525, the court held that on the facts in this case the draftee was erroneously denied the benefits of the exemption he claimed and held this to be an error of law, and then went on to state in the opinion that it has been

considered settled under both the draft act of 1917 and the present act that *errors of law are to be rectified by the courts,* and that the writ of habeas corpus should be sustained.

In *ex parte Stanziale* (C.C.A. 3, decided October 6, 1943, 138 F. (2d) 312, 316, the court assumed that if a local board violates the provisions of one of the regulations laid down for its guidance, the person affected by the violation may have court relief.

In *United States ex rel. Beye v. Downer* (C.C.A. 2, decided May 29, 1944) 143 F. (2d) 125, the court held that the local board had clearly disregarded the regulations and, therefore, the registrant was improperly inducted. In this case the trial court had dismissed the writ of habeas corpus and the trial judge was reversed and this court held that the registrant was entitled to be discharged under the writ because the local draft board violated the regulations under the Selective Service Act.

Under the above authorities which, petitioner submits, correctly state the law, it is clear that if a registrant is classified by a local board as a result of that board's failure to act in accordance with the regulations of the Selective Service System, then that classification is illegal and if the registrant is inducted into the Army he is legally entiled to be discharged under a writ of habeas corpus by the courts. The same is true where the draft boards act under

a misunderstanding of the law or commit errors of law. The courts will rectify these errors under a writ of habeas corpus.

It has been clearly pointed out herein that the registrant in this case was classified by a draft board that violated the regulations, and the classification of I-A was the result of these violations. It is also clear that the draft board acted either under a misunderstanding of the law, namely, the requirement of two or three years as a factor of production, and the unlawful delegation of the decision to the county war board, or the draft board just plainly and deliberately violated the law in order to accomplish its ends and to satisfy its own personal feelings and to give expression to their bias and prejudice, believing that the matter would probably never get into court, and that in the event it did get into court, hoping that the court would sustain them, not because they acted legally, but because of the natural hesitancy to rule against the action of the draft board.

For the reasons stated above this Honorable Court should grant petitioner's petition for a writ of certiorari, as the decision of the Ninth Circuit Court of Appeals in the case at bar was directly contrary to the law as recognized by the other Circuit Courts.

V.

The Ninth Circuit Court of Appeals erred in reversing the trial court where the findings of fact of the trial court in a habeas corpus proceedings were supported by substantial evidence and were not clearly wrong.

It is the recognized function of a trial court in a case tried without a jury to consider the evidence and weigh the facts and then enter its findings of fact and conclusions of law. It is the function of the appellate court to determine whether or not the trial court committed any errors of law and also to determine, where the record is properly saved, whether or not there was any evidence to sustain the findings of fact of the trial court. When this case was presented to the trial court, Judge Leavy considered the evidence presented to him and as stated in the opinion of the Circuit Court of Appeals, rendered a careful opinion covering many points. By stipulation between the parties, Judge Leavy's opinion was made the findings of fact and conclusions of law of the trial court.

It is a well recognized principle of law that hardly needs citation that in a habeas corpus proceeding the findings of fact of the trial court may not be set aside by the appellate court, unless clearly erroneous. (Rules of Civil Procedure, 52(a), 81(a), (2),

28 U.S.C.A. following section 723c; *Macomber v. Hudspeth*, 10th Cir., 115 F. (2d) 114, 116.)

The above statement was taken from an opinion by Justice Wilbur in the case of *Kelly v. Johnston*, (C.C.A. 9 Decided June 8, 1942), 128 F. (2d) 793. Also the same statement is contained in the Supplement to *O'Brien's Manuel of Federal Appellate Procedure*, Third Edition, at page 30.

The Circuit Court of Appeals in its opinion states that it is unable to agree with the view taken by the trial judge. The trial judge made a definite finding of fact to the effect that there was bias shown by the local draft board, the appeal board, and the county war board. (R. 82); that the local board acted very arbitrarily in finding that the information submitted by the registrant did not warrant reopening of his classification (R. 90); that the actions of the boards cannot be accounted for, except on the basis of bias or prejudice (R. 90).

The opinion of the Circuit Court of Appeals fails to disclose any reason for reversing the trial judge, except that it disagreed with the trial judge. The opinion does not state, nor could it state, that the findings of fact of the trial judge were clearly erroneous and not supported by any evidence. The question before the appellate court was whether or not Judge Leavy's findings were clearly erroneous and not supported by any evidence.

The said opinion clearly indicates that this established principle of law was departed from in the consideration of this case by the Ninth Circuit Court of Appeals.

In connection with this point, the petitioner respectfully calls this Honorable court's attention to the fact that the opinion does not point out a single error committed by the trial court. The opinion merely reverses the trial court without stating any reason therefor, except that the appellate court disagreed with the trial court.

This is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari is well grounded, and that it should be granted.

Dated at Portland, Oregon, this 20th day of July, 1945.

Respectfully submitted,

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